

BEFORE THE  
BOARD OF PSYCHOLOGY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition to  
Revoke Probation Against:

DONALD K. SMITH, Ph.D.  
333 City Boulevard West, #1235  
Orange, CA 92668

Psychologist's License No. PSY 11278

Respondent.

Case No. W277

OAH No. L2004110129

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by  
the Board of Psychology as its Decision in the above-entitled matter.

This Decision shall become effective December 22, 2005.

IT IS SO ORDERED.

Date: November 22, 2005

Jacqueline B. Horn, Ph.D.  
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President, Board of Psychology  
Department of Consumer Affairs

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**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on September 26, 27 and 28, 2005.

Samuel K. Hammond, Deputy Attorney General, represented complainant Jeff Thomas, the Interim Executive Officer of the Board of Psychology, Department of Consumer Affairs, State of California.

Russell Iungerich, Attorney at Law, represented respondent Donald K. Smith, Ph.D., who was present throughout the administrative hearing.

The matter was submitted on September 28, 2005.

**FACTUAL FINDINGS**

*Jurisdictional Matters*

1. On July 6, 2004, Thomas O'Connor, who was then the Executive Officer of the Board of Psychology (the Board), Department of Consumer Affairs, State of California, signed the Accusation and Petition to Revoke Probation in Case No. W277. The accusation and petition were served on respondent Donald K. Smith, Ph.D. (Dr. Smith or respondent).

A Notice of Defense and Special Notice of Defense was timely filed by Pamela Ann Thatcher, who was then Dr. Smith's attorney. Subsequent thereto, Russell Iungerich became Dr. Smith's attorney of record.

On August 4, 2005, respondent (through counsel) filed a motion to dismiss the accusation and petition on the grounds of judicial immunity and on the grounds that the acts referred to in the petition to revoke probation occurred before Dr. Smith was placed on probation. On August 15, 2005, complainant filed opposition to the motion to dismiss.

On August 16, 2005, Administrative Law Judge Vallera Johnson (ALJ Johnson) presided over a prehearing conference which included oral arguments on respondent's motion to dismiss. In addition, the prehearing conference reviewed the status of the case and considered matters necessary to promote the orderly and prompt conduct of the hearing.<sup>1</sup>

On August 19, 2005, respondent filed an Amended Special Notice of Defense which included affirmative defenses alleging the accusation failed to state facts sufficient to support the imposition of license discipline, respondent enjoyed quasi-judicial immunity for all psychological services provided within the scope of his appointment as a superior court evaluator, the alleged violation of probation occurred before probation went into effect, and no public purpose would be served by imposing license discipline.

On August 24, 2005, ALJ Johnson issued a ruling denying respondent's motion to dismiss. Each party was served with a copy of that order.

On August 26, 2005, ALJ Johnson issued a prehearing conference order in accordance with discussions occurring at the prehearing conference. Item 9 of the order stated:

"No later than September 19, 2005, complainant shall serve respondent with an Interim Certification of Costs and supporting documentation. The Final Certification of Costs shall be served on the first day of hearing, prior to commencement of the hearing."

Each party was served with a copy of the prehearing conference order. No party objected to the order. No party appealed any portion of the order to the Superior Court.

On September 16, 2005, an Amended Accusation and Petition to Revoke Probation was filed with the Office of Administrative Hearings. The new allegations were deemed controverted by operation of law.<sup>2</sup>

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<sup>1</sup> Government Code section 11511.5 authorized the prehearing conference. California Code of Regulations, title 1, section 1026 sets forth what information the parties must provide at the conference and requires the administrative law judge to issue a prehearing conference order.

<sup>2</sup> Government Code section 11507.



On September 26, 2005, the record was opened and jurisdictional documents were presented. Respondent's oral motion to dismiss the accusation and petition the grounds of Dr. Smith's asserted quasi-judicial immunity was denied. Respondent's oral motion to dismiss the accusation and petition to revoke probation on the grounds that the administrative disciplinary proceeding violated the separation of powers clause and improperly invaded the province of the superior court was denied. Respondent's motion to suppress the court-ordered child custody evaluation report that respondent prepared on the grounds that the evaluation was illegally obtained and to exclude all testimony related to that evaluation as "fruit of the poisonous tree" was denied. Opening statements were waived.

On September 26 and 27, sworn testimony and documentary evidence was received.

On September 27 and 28, complainant requested the administrative law judge to reconsider his evidentiary ruling concerning the admissibility of the certification costs. The request was denied.

On September 28, closing arguments were given, the record was closed and the matter was submitted.

#### *Respondent's Education, Training and Experience*

2. Dr. Smith received an Associates of Arts degree in Psychology from Santa Ana Community College in 1969, a Bachelor of Arts degree in Psychology (with honors) from California State University, Fullerton, in 1973, a Masters of Science degree in Counseling Psychology/Educational Psychology from California State University, Fullerton, in 1977, and a Ph.D. in Clinical Psychology from California Graduate Institute in 1982.

Before engaging exclusively in forensic work, Dr. Smith served as an educational consultant and psychologist at Capistrano by the Sea Hospital, as an educational psychologist and counselor for the Tustin-Irvine Pediatric Medical Group, the Center for Parents and Children, and the Center for Education, as a school psychologist with the Tustin Unified School District, as a consultant to Parents Participation Nursery Schools and American Christian Schools, International, and as the Director of the Learning Behaviors Disorders Clinic for the Children's Hospital of Orange County.

Within the past 15 years, Dr. Smith has worked almost exclusively as a forensic psychologist, specializing in family law and juvenile matters in superior courts and juvenile courts in Orange County, Los Angeles County and Riverside County. Dr. Smith's primary focus is as a court-appointed expert evaluator under Evidence Code section 730<sup>3</sup> and as a

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<sup>3</sup> Evidence Code section 730 provides in part:

"When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence



litigant's expert witness under Evidence Code section 733. Dr. Smith has performed over 1,500 custody evaluations and he has been retained as an expert witness by a litigant under Evidence Code section 733 about 30-40 times. In addition, Dr. Smith has provided expert testimony in a handful of criminal matters.

### *Respondent's License Histories*

3. On June 5, 1978, the Board of Behavioral Science Examiners (BBSE) issued Educational Psychologist License No. 738 to Dr. Smith. On January 10, 1979, the Board of Behavioral Science Examiners issued Marriage, Family and Child Counselor License No. 11357 to Dr. Smith.<sup>4</sup>

On May 18, 1994, Accusation No. ME-42 was filed by the BBSE against Educational Psychologist License No. 738 and Family and Child Counselor License No. 11357. The accusation alleged Dr. Smith engaged in unprofessional conduct in connection with two child custody evaluations.

On July 28, 1994, the BBSE issued a "letter of understanding" which stated Dr. Smith denied engaging in unprofessional conduct but acknowledged it was "a departure from [the] standard of care to 1) fail to thoroughly and carefully evaluate a child, each parent and other relevant family members prior to preparing a report that, directly or indirectly, relates to or will be used in connection with custody matters; 2) fail to obtain all relevant records . . . prior to preparing a report that, directly or indirectly, relates to or will be used in connection with custody matters; 3) make any statement of fact or any statement that could reasonably be viewed as a statement of fact without obtaining all information necessary to establish such fact; and 4) fail to interview and carefully evaluate a person prior to preparing a report that, directly or indirectly, expresses or could be viewed as expressing an opinion about that person." The letter of understanding stated that upon Dr. Smith's payment of \$1,500 in costs and upon his acceptance of the letter, the accusation would be withdrawn.

There is no other history of discipline against Educational Psychologist License No. 738 or Family and Child Counselor License No. 11357.

4. On August 1, 1989, the Board of Psychology issued Psychologist License No. PSY 11278 to Dr. Smith.

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is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act."

<sup>4</sup> According to his Curriculum Vitae, Dr. Smith holds Marriage, Family, Child Counselor License No. MV013577 and Licensed Educational Psychologist License No. 738, which were the subjects of disciplinary action in Case No. ME-42. The Accusation filed in Case No. ME-42 set forth the dates the licenses were issued.



On April 6, 1999, Accusation No. W162 was filed by the Board of Psychology against Psychologist License No. PSY 11278. A Second Amended Accusation was filed on September 13, 2000. The Second Amended Accusation alleged Dr. Smith engaged in unprofessional conduct in connection with two child custody evaluations. Dr. Smith was specifically charged with gross negligence, incompetence and repeated negligent acts in both cases and, in addition, with dishonesty in one of the cases. With regard to the dishonesty charges, it was alleged Dr. Smith falsely denied having threatened a patient in October 1997 and falsely represented he had a business license during the period he was evaluating that patient when in fact he was not licensed for the full period he evaluated the patient.

On August 14, 2001, Dr. Smith signed a Stipulated Settlement and Disciplinary Order in resolution of Case No. W162. Dr. Smith was represented by counsel. Paragraph 9 of the agreement stated, "For purposes of resolving Accusation No. W162 . . . and the current or past investigations concerning respondent and C.B. (1F 2001-117768); S.I. (1F-2000-116088); J.H. (1F1999-102845), respondent admits that at the hearing the complainant could prove at least a prima facie case to the charges alleged . . . and that respondent has thereby subjected his Psychologist's License No. PSY 11278 to disciplinary action."

The Board of Psychology adopted the Stipulated Settlement and Disciplinary Order, which became effective on November 14, 2001. The Disciplinary Order revoked Psychology License No. PSY 11278, but stayed the revocation and placed Dr. Smith on probation for five years on terms and conditions of probation requiring him (1) to complete additional pre-approved course work, (2) to complete an educational review, (3) to pay \$15,000 in costs; (4) to pay probation costs, (5) to obey all laws, (6) to submit quarterly reports, (7) to comply with the probation program, (8) to appear in person for interviews as required, (9) to change employment only with Board approval, and (10) not to employ or supervise assistants, interns or trainees during his probation.

There is no other history of discipline against Psychologist License No. PSY 11278.

#### *Child Custody Evaluations*

5. Perhaps no other contested legal action is more sensitive and emotionally charged than a child custody dispute. In most cases, each parent has contributed in unique ways to a child's development. While there are surely instances where one parent has been abusive or lacks the basic skills to disqualify that parent from serving as an equal parenting figure, most cases involve two relatively good and loving, though imperfect, parents.

Judicial decisions concerning child custody must be based on the child's best interest. The ultimate decisions in many contested cases are based in large measure upon the child custody evaluations and recommendations provided to the court by professional, competent child custody evaluators. The importance of qualified, neutral, court-appointed child custody evaluators within the family law system cannot be understated.



6. The American Psychological Association (APA) has recognized that when parents cannot agree on child custody, a court must resolve the issue according to the "best interest of the child" standard. According to the APA, psychologists provide an important service to children and the courts by providing competent, objective and impartial information in assessing the best interests of the child, by demonstrating a clear sense of direction and purpose in child custody evaluations, and by clarifying the nature and scope of the child custody evaluation.

In 1994, the APA published ethical guidelines for child custody evaluations. All of the experts agreed that these guidelines were helpful in establishing the standard of care expected of psychologists who provide evaluations in child custody proceedings. These ethical standards underscore the importance of determining the child's best interests, the need for impartiality and competence in conducting the child custody evaluation, the importance of obtaining informed consents and limiting the evaluation to the referral question, the value of using multiple methods of data gathering, and other concerns.

7. In California the mother and father of an unemancipated minor child are equally entitled to the custody of the child. Family Code section 3010.

In making a determination concerning the best interest of the child in a child custody proceeding, the court considers the health, safety and welfare of the child; any history of abuse by one parent against any child to whom he or she is related by blood or with whom there has been a caretaking relationship, no matter how temporary, or the other parent or a parent, current spouse or cohabitant (as a prerequisite to considering abuse allegations, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies); and, the nature and amount of the child's contact with both parents. Where abuse allegations have been brought to the attention of the court and the court makes an order for sole or joint custody, the court must state its reasons in writing or on the record. See, Family Code section 3011.

Family Code section 3111 authorizes a court to appoint a child custody evaluator in any contested proceeding involving child custody or visitation where the court determines that would be in the child's best interests. The evaluation must be conducted in accordance with California Judicial Council standards. When directed by the court, a court-appointed evaluator must conduct a custody investigation and file a written confidential report. That report may be considered by the court and it must be filed and served on the parties or their attorneys before any custody hearing. The report may not be otherwise made available, but it may be received in evidence on stipulation of all interested parties, and the report is deemed by statute to be competent evidence as to all matters contained in it.

Family Code section 3110.5 describes the qualifications required of a child custody evaluator. A child custody evaluator must complete a prescribed domestic violence and child abuse training program, meet Judicial Council requirements and have knowledge of the psychological and developmental needs of children and parent-child relationships.



Evaluators must utilize comparable interview, assessment and testing procedures for all parties, which must be consistent with generally accepted clinical, forensic, scientific, diagnostic or medical standards. Evaluators must inform each adult party of the purpose, nature and method of the evaluation. On and after January 1, 2005, no person may be a child custody evaluator under the Family Code, or under Evidence Code section 730, or under Code of Civil Procedure section 2032 unless the person (1) is licensed as a physician and either is a board certified psychiatrist or has completed a residency in psychiatry, or (2) is licensed as a psychologist, or (3) is licensed as a marriage and family therapist, or (4) is licensed as a clinical social worker, or (5) is a court-connected evaluator who has been certified by the court as meeting all of the qualifications for court-connected evaluators.

8. Family Code section 3110.5, subdivision (e) specifically provides:

“A child custody evaluator who is licensed by the Medical Board of California, the Board of Psychology, or the Board of Behavioral Sciences shall be subject to disciplinary action by that board for unprofessional conduct, as defined in the licensing law applicable to that licensee.”

9. California Rules of Court, Rule 5.220 relates to court-ordered child custody evaluations. Among other matters, it requires the evaluator observe and consider each party in comparable ways, review pertinent documents (including local police records), and collect relevant corroborating information or documents as permitted by law.

10. Orange County Superior Court Rule 703 provides in part that any written report from any person appointed by the court to render any report is confidential and unavailable to any person except the court, the attorneys of record and any other person to whom the court grants access by written order. Unauthorized reproduction of the reports is prohibited. Rule 703 states the purpose of a “730 Evaluation” is to provide the court with accurate, comprehensive, and constructive information regarding the best interests of the child.

*The Child Custody Determination Concerning Kelsey K.*

11. On September 1, 2000, Tim K. filed an action for dissolution of marriage in the Superior Court of California, Orange County, to terminate his 12-year marriage to Darnell K. In his petition for dissolution, Tim sought full custody of Kelsey K., the daughter, on the basis that Darnell had misused and abandoned their child.

On November 21, 2000, Darnell filed a request for a restraining order, alleging Tim had engaged in domestic violence and had “absconded with the minor child . . . .”

On November 29, 2000 (following the issuance of a temporary restraining order and the temporary award of custody to Darnell), a custody investigation was ordered.



12. On December 18, 2000, pursuant to a stipulation of the parties, Dr. Smith was appointed to conduct a custody and visitation evaluation under Evidence Code section 730.

On July 9, 2001, Dr. Smith filed his report with the court.

13. On April 12, 2002, the custody issue was tried before the Honorable Richard G. Vogl, Commissioner of the Superior Court. Tim, Darnell and Dr. Smith testified.<sup>5</sup>

In the course of the trial, Dr. Smith admitted a disciplinary action had been filed against his license in "November, this last year." Dr. Smith conceded the charges included "gross negligence," but he testified he could not recall if there were any accusations of fraud or other misconduct.<sup>6</sup>

14. In the judgment following the child custody trial, Tim and Darnell were awarded joint legal custody and were given all major decisions regarding Kelsey. The judgment stated, "Although parental access of the parties with the child shall be as defined in this order, actual physical custody shall be vested with respondent/mother."

#### *Dr. Smith's Child Custody Evaluation*

15. Dr. Smith's Report and Addendum: Dr. Smith authored a 36 page narrative report dated May 3, 2001 and a four page addendum dated June 19, 2001.<sup>7</sup> These documents set forth the manner in which Dr. Smith conducted the interviews and evaluations resulting in his recommendations. Not all portions of those documents need be detailed, but some of the information and methodology contained in those documents must be discussed.

16. Scope of the Evaluation: Dr. Smith identified Kelsey as the "subject and focus of this E.C. 730 study." He outlined the custody orders he believed were currently in effect.

Between January 4 and March 23, 2001, Dr. Smith interviewed Tim (the father) for one and a half hours; administered four and a half hours of psychological testing to Tim; observed Tim, his girlfriend and Kelsey interact for 10 minutes; interviewed Tim's girlfriend for 10 minutes; interviewed Kelsey for 30 minutes; spoke with Darnell (the mother) and her fiancée for two hours; administered four and a half hours of psychological testing to Darnell;

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<sup>5</sup> This information is contained in Exhibit G.

<sup>6</sup> Exhibit 4 includes the reporter's partial transcript setting forth this testimony.

<sup>7</sup> Page 3 of the Board's investigation report stated on April 3, 2003, the Medical Board's Central Complaint Unit received a signed authorization for the release of medical records and "a thirty-six (36) page report dated May 3, 2001, by Donald Smith, Ph.D. and a four page report by Donald Smith, Ph.D., dated June 19, 2001." Exactly who obtained the report and the circumstances under which the report was obtained was something of a mystery, except that it was clear that the report was not obtained by the Board, its employees or agents directly from the Orange County Superior Court.



administered three and half hours of psychological testing to Darnell's fiancée; observed Darnell and her fiancée for 10 minutes; and interviewed the child for 25 minutes.

17. The Father's Allegations: In his interview with Dr. Smith, Tim accused Darnell of hitting the children in the face repeatedly, using horrible words and being out of control in Kelsey's presence, hitting her step-mother with a telephone in Kelsey's presence, using drugs, and using her children to shoplift and having been arrested for shoplifting. Tim said two child protective service (CPS) reports had been filed against Darnell, one in 1982 and one in 1986 for physical abuse involving Brennan, an older son from Darnell's relationship with another man. Tim admitted Darnell had accused him of domestic violence, which he claimed consisted of grabbing Darnell and blowing hot air in her face. Tim denied having any arrests and he denied having any contact with CPS.

18. The Mother's Allegations: In her interview with Dr. Smith, Darnell accused Tim of having an explosive temper, engaging in domestic violence, talking negatively about her in Kelsey's presence, spanking Kelsey's bare bottom, and trying to starve her. Darnell told Dr. Smith she slapped Kelsey's hand to impose discipline, but she did not spank her. She admitted slapping Kelsey in the face within the last three years, but she could not recall when. She admitted she had been arrested for shoplifting four years before the interview, for which she said she was ticketed and fined. Darnell admitted she was reported to CPS for spanking Brennan and said the matter was dropped.

19. Collateral Information: In the "collateral" section of his report, Dr. Smith stated, among other matters, he:

- Read additional concerns, handwritten, forwarded by [the mother], dated 2-27-01;
- Read additional concerns, faxed by [the father];
- Read letter written by Noah D [ ], dated January 21, 2001;
- Read letter written by [the mother], dated March 23, 2001, which appeared to be a rebuttal to the letter noted above . . . ;
- Attempted to read letter apparently written by paternal grandparents, on behalf of Kelsey K [ ], dated 11-24-00;
- Read letter written by Julia D [ ], dated November 25, 2000, on behalf of [the father],
- Read letter written by Kris K [ ] dated November 27, 2000 . . . ;
- April 20, 2001, received a phone call from Julia D [ ]. The call was returned and a message was left on voice mail; and,
- April 24, 2001, "[the father] hand-delivered a plethora of documentation to my office, with a cover letter noting additional concerns" (the documents included the handwritten declaration of Soani and Bob K [ ], paternal grandparents, a handwritten letter from Julia D [ ], the mother's stepmother, and a handwritten letter from Noah D [ ], the mother's half-brother).

Dr. Smith testified he asked Darnell to produce the CPS reports, or in the alternative, to provide him with authorization to access those reports. Darnell said she would do so, but



she failed to follow through on her promise. Dr. Smith forgot about the matter and he never obtained the CPS reports.

Dr. Smith did not contact any of the authors of the letters he reviewed. His report did not summarize or set forth the content of those letters. Dr. Smith maintained copies of the letters and declarations in his file.

Dr. Smith's report mentioned that Tim's girlfriend had four children and the Darnell's fiancée had five children. It was clear Kelsey would be spending much time in the presence of some if not all of these children, whatever custody order was rendered. Dr. Smith did not speak with any of these children.

Dr. Smith's report noted Kelsey was scheduled to see Dr. Mary Singleton, a therapist. Dr. Smith did not speak with Dr. Singleton before he decided to author his addendum.

20. Testing and Impressions: Dr. Smith's report described the psychological testing he administered to the father, the mother and her fiancée. The report stated the father's girlfriend "did not participate in the psychological testing portion of this evaluation." According to Dr. Smith, the girlfriend refused to do so, as was her right. Dr. Smith's report set forth various written impressions arising out of the psychological testing, much of which was computer generated.

21. Dr. Smith's Recommendations: In his evaluation dated May 3, 2001, Dr. Smith recommended joint legal custody, with Darnell to have physical custody because "Kelsey does appear to be identifying more with her mother than with her father." He further wrote, "because of Kelsey's close attachment to her mother, it appears in Kelsey's 'best interests' to be in the physical custody of her mother unless [the mother] is found to be alienating, circumventing, or restricting [the father's] contact with Kelsey."

Dr. Smith made other recommendations in his evaluation including anger management classes for both parents, communication counseling for both parents, individual counseling for both parents, random drug screens for both parents, and the requirement for each parent to complete a parenting class.

22. The Addendum: Dr. Smith's June 19, 2001 addendum stated he met with Kelsey an additional hour on May 14, 2001, had a telephone conversation with Darnell's fiancée, met with Tim on May 15, 2001 for an additional interview, met with Darnell on May 15, 2001, for an additional interview, spoke with Brennan [ ] by telephone on May 15, 2001 (in which only Brennan's living arrangements were discussed and reported), spoke with Dr. Singleton by telephone on May 31, 2001 (who reported there did not appear to be a lot of supervision when Kelsey was with her mother and Kelsey's school effort appeared poor<sup>8</sup>),

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<sup>8</sup> Dr. Singleton also said Kelsey appeared depressed, said she wanted to live with her father, made her own TV dinners in the evening, and recommended custody be with the father, who appeared to be more nurturing.

and reviewed a letter from the attorneys advising him that it was not necessary to make a home visit.

Dr. Smith wrote “this addendum offers no change or alteration to recommendations noted in my full E.C. 730 report of May 3, 2001.

### *The Need for Expert Testimony*

23. A court-appointed child custody evaluator must possess and exercise that degree of skill, prudence, and diligence as other members of the professional community commonly possess and exercise, which is known as the standard of care. The standard of care is the metric by which the acts of a licensed professional are measured. The standard of care is a matter peculiarly within the knowledge of experts and it must be established by expert evidence.<sup>9</sup>

24. Different court-appointed child custody evaluators may disagree in good faith about what would encompass a proper evaluation in a specific child custody evaluation. It is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need to exercise professional judgment as to what course of conduct would be most appropriate. It is for the court-appointed evaluator to use his best judgment to pick the proper course of action within the framework in which professional services are provided.

### *The Standard of Care – Negligence, Gross Negligence, Incompetence*

25. In this matter, the “standard of care” described what a qualified, reasonable and prudent court-appointed child custody evaluator would or would not do under the same or similar circumstances as those presented by the evidence.

A court-appointed child custody evaluator is human and it is inevitable that he or she will, on occasion, depart from the standard of care expected of the ordinary, reasonable and prudent court-appointed child custody evaluator. A slight departure from the standard of care is simple negligence.

Gross negligence is a term used to describe the want of even scant care or an extreme departure from the standard of care.

Incompetence is a term indicating an absence of qualification, ability or fitness to perform a prescribed duty or function. Incompetence is distinguished from negligence in that one may be competent to performing a given duty but negligent in performing that duty. A single act of negligence may be attributable to carelessness in discharging a duty rather than a lack of basic skills.

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<sup>9</sup> See, *Elcome v. Chin* (2003) 110 Cal.App.4th 310, 317.



### *Complainant's Expert Witnesses*

26. Richard Owen, Ph.D. (Dr. Owen) is a licensed clinical psychologist who received his Ph.D. in Psychology in 1988. He practices individual and family therapy in Escondido, California. Dr. Owen was familiar with the APA standards and with the community standards concerning child custody evaluations. Dr. Owen had conducted 20-30 evaluations under Evidence Code section 730 as a court-appointed child custody evaluator, the last of which was conducted at least five years ago.

In forming his opinions and conclusions in this matter, Dr. Owen reviewed Dr. Smith's evaluation and addendum, the letters and documents referred to in those documents, the partial trial transcript, prior disciplinary materials concerning Dr. Smith, audio tape interviews of Dr. Smith, the APA ethical principles, and various laws and regulations related to the practice of psychology not including the rules of court and local rules.

27. W. Russell Johnson, Ph.D. (Dr. Johnson) is a licensed clinical psychologist who received his Ph.D. in Psychology in 1975. He engages in private practice in Orange County, and his current practice is limited to child custody evaluations and counseling families dealing with divorce and child custody issues. About 99% of his practice is in the Orange County Superior Court, where he has been a child custody evaluator thousands of times. Dr. Johnson is an adjunct faculty member at the School of Medicine, University of California, Irvine, and he has been a featured presenter at several professional meetings and workshops in the field of child custody evaluations.

Dr. Johnson was asked by Tim's attorney to review Dr. Smith's report in the child custody proceeding underlying this disciplinary proceeding. In forming his opinions and conclusions in this matter, Dr. Owen reviewed Dr. Smith's evaluation and addendum, as well as the letters and documents Dr. Smith referred to.

### *Respondent's Expert Witnesses*

28. Dr. Smith provided both percipient and expert testimony. His qualifications, education, experience and training are outlined in Factual Findings 2-4.

29. Stephen E. Berger, Ph.D. (Dr. Berger) is a licensed clinical psychologist who received his Ph.D. in Psychology in 1971. He practices adult, child, individual and group psychotherapy and provides neuropsychological assessments. He has offices in Laguna Hills, California. Dr. Berger teaches several courses at Argosy University including an Ethics and Law course and a Civil Law and Psychology course, which include reference to Evidence Code section 730 examinations. Dr. Berger testified he was familiar with the APA ethical standards and with the community standards concerning child custody evaluations. He had reviewed two or three dozen child custody evaluations.

Dr. Berger had never conducted an evaluation under Evidence Code section 730 as a court-appointed child custody evaluator.



In forming his opinions and conclusions in this matter, Dr. Berger reviewed Dr. Smith's evaluation and addendum, the letters and documents referred to in those documents, the partial trial transcript, and Dr. Owen's report.

*Specific Allegations Concerning Departures from the Standards of Care*

30. The Amended Accusation contained numerous specific factual allegations of professional misconduct which may be identified as follows: (1) Dr. Smith failed to adequately interview and test Kelsey and to spend enough time observing her in the presence of her parents and their significant others; (2) Dr. Smith failed to perform psychological testing on the father's girlfriend and failed to use parallel and equivalent evaluation methods; and, (3) Dr. Smith failed to interview persons who submitted written statements concerning the mother's alleged history of physical abuse and shoplifting and others having a significant relationship to Kelsey.

31. Dr. Smith's alleged failure to adequately interview and test Kelsey and to observe her in the presence of her parents and their significant others:

Dr. Owen was critical that Dr. Smith's first interview with Kelsey lasted 30 minutes and his second interview, two months later, lasted 25 minutes. Dr. Owen felt the time spent interviewing Kelsey was below the standard of care. Both Dr. Owen and Dr. Johnson were critical of the limited time Dr. Smith spent observing Kelsey in the presence of each parent and the significant other, which was ten minutes, and each testified that was below the standard of care. Both Dr. Owen and Dr. Johnson were critical of Dr. Smith's use of a single projective test (a "draw your family" exercise) by which they believed Dr. Smith apparently concluded Kelsey was more closely attached to her mother than her father.<sup>10</sup> Each felt that reliance on a single projective test to reach such a conclusion was an extreme departure from the standard of care.

Dr. Smith testified he met with Kelsey twice in single interviews, twice in meetings with her parents and their significant others and once more after drafting his initial report, as indicated in his addendum. He observed Kelsey was bright, spontaneous and secure. No more time was needed to observe and interview Kelsey than was spent. Dr. Smith testified his conclusion that Kelsey was more closely attached to her mother than her father was not based on a single projective test, but was based on his evaluation of all the evidence.

Dr. Berger testified the time required to be spent interviewing principals in a child custody evaluation was a matter within the judgment of evaluator and there was no evidence that Dr. Smith spent too little time. Dr. Berger felt the projective test Dr. Smith administered

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<sup>10</sup> In the summary of Dr. Smith's report, at page 33, it is stated: "In interpreting single projective, 'Self with Mother and Father,' Kelsey appears to be more attached and to be identifying more with her mother than with her father, at this time." A similar comment was made at page 28 of the report.



was quite similar to but more appropriate than the kinetic family drawing test, which is widely recognized and accepted within the professional community, and Dr. Berger's conclusion that Kelsey appeared to be closer to her mother appeared to be based on all the information Dr. Smith had reviewed, not a single projective test. Dr. Berger conceded that Dr. Smith's conclusion in this regard could have been presented more clearly.

Conclusion: The time required to be spent interviewing a child in a child custody matter varies from case to case and depends on all the circumstances, including the child, the environment in which the interview is conducted, the underlying circumstances, and the evaluator's skills. How much time should be spent in interviews is a matter of professional judgment based upon the result of the interviews.

While the time spent by Dr. Smith interviewing Kelsey appeared to be quite limited, it cannot be concluded the length of time was inadequate or unreasonable. Nor can it be concluded that Dr. Smith's use of a single projective test, if integrated with other information he gained over the course of the evaluation, unreasonably led to his conclusion that Kelsey was closer to her mother than her father. Dr. Smith's report did not expressly mention the other matters corroborating his impression from the projective test, but this report writing omission did not equate to a lack of scant care or an extreme departure from the standard of care, although it demonstrated some carelessness.

32. Dr. Smith's alleged failure to perform psychological testing on the father's girlfriend and his failure to use parallel and equivalent evaluation methods:

Dr. Smith administered psychological testing to Darnell, her fiancée and Tim, but not to Tim's girlfriend. Dr. Smith testified he wanted to administer testing to the girlfriend, but she refused. In his report, Dr. Smith stated the girlfriend "did not participate in the psychological testing portion of this evaluation."

Dr. Owen and Dr. Johnson were critical of the failure to test the girlfriend, evidently believing this was a result of Dr. Smith's omission rather than her refusal.

Dr. Smith administered the MMPI-2, the MCMI-III, the Parenting Stress Index, the Parent-Child Relationship Inventory, the Parenting Satisfaction Scale, the Child Abuse Potential Inventory Form-VI to each parent. He spent essentially the same amount of time in interviews with each parent and their significant others.

Dr. Owen testified Dr. Smith did not adequately interpret test findings, relying on and reporting computer-generated interpretive summaries for the MMPI-2 and the MCMI-III, but did not provide any interpretation for the CAPI-VI other than neither parent appeared to possess any physical child abuse characteristics. Dr. Owen was also concerned about the possibility of Darnell and her fiancée taking the test in the room at the same time. Dr. Johnson had similar concerns and believed Dr. Smith incorrectly reported the scores on the PCRI tests.



Dr. Smith testified his testing was appropriate and he reported all significant findings.

Dr. Berger believed Dr. Smith's testing was appropriate and he integrated all significant findings into his conclusions. The failure to report all of the CAPI-VI test results had absolutely no effect on the outcome.

Conclusion: The failure to administer a psychological test to a significant other who refused to submit to psychological testing was not conduct falling below the standard of care. Nor was the wording "did not participate in the psychological testing portion of this evaluation" an inadequate expression to explain the significant other's refusal.

The psychological tests that were administered were appropriate. It was not below the standard of care for Dr. Smith to include computer-generated impressions in his report, and while he could have done a better job of integrating the test results, all of the essential information he gained from testing was presented (with the exception of the CAPI-VI test results which, under the circumstances, was a minor omission).

33. Dr. Smith's alleged failure to interview persons who submitted written statements concerning Darnell's alleged history of physical abuse and shoplifting and the failure to interview others having a significant relationship to Kelsey: This is the area in which Dr. Smith clearly engaged in gross negligence and repeated negligent acts.

Dr. Smith was presented with statements, writings and other documentation from persons having personal knowledge which had a bearing upon Darnell's history of abuse and contact with CPS as follows:

- Julia D [ ], Darnell's stepmother, stated she lived with Darnell and Tim for several months and observed Darnell slap her children in the face and be abusive. Julia D [ ] stated she had been physically abused by Darnell in Kelsey's presence.

Dr. Smith's report simply stated he "Read letter written by Julia D [ ], dated November 25, 2000, on behalf of Mr. K [ ]" and Dr. Smith wrote stated he attempted to return Julia D [ ]'s phone call to him on one occasion and left a message for her on voice mail. Dr. Smith never spoke with Julia D.

- Kris K., Kelsey's aunt, wrote a letter stating Darnell was a liar who would do anything to get what she wanted, was quick to anger, used vulgar language, was physically aggressive, and had attempted to push Kris K.'s husband down some stairs on one occasion.

Dr. Smith's report simply stated "Read letter written by Kris K [ ], dated November 25, 2000, on behalf of Mr. K [ ]." Dr. Smith made no effort to contact Kris K.



- Noah D., Darnell's half-brother, stated Darnell was a thief and a liar who slapped her children with an open hand and once physically stuck Noah D.

Dr. Smith's report simply stated he "Read letter written by Noah D [ ], dated January 21, 2001." Dr. Smith made no effort to contact Noah D.

- Bob and Soani K, the paternal grandparents, in a letter written by Bob K. stated they had lived with Kelsey and Tim for several months, a period in which Kelsey appeared to be well adjusted. They stated they were concerned if custody were awarded to anyone other than Tim.

Dr. Smith's report stated he spoke with Sonia K. on April 16, 2001, and she described her living conditions as well as Kelsey's living situation when Tim brought Kelsey to her family's home. No mention was made of Darnell, her tendency to violence, if any, or any other matter raised in the other letters in his report. Dr. Smith testified he did not talk to the paternal grandfather because Tim did not ask him to do so. Dr. Smith said it was not his practice to interview grandparents because their views were usually too one-sided.

Dr. Smith testified that when he spoke with Brennan, "I had my own agenda . . . and those things [Darnell's acts of child abuse on Brennan and Kelsey] skipped my mind."

Dr. Owen and Dr. Johnson testified Dr. Smith's failure to contact these persons, who claimed to have personal knowledge bearing upon Darnell's alleged poor character, lack of parenting skills and tendency to violence constituted an extreme departure from the standard of care. At the very minimum, the contents of these letters should have been disclosed to the court. No meaningful information was provided to the court by Dr. Smith simply stating he had read those letters and documents.

Dr. Smith stated that even though he had no duty to contact these persons, he did speak with the paternal grandmother and he did attempt to telephone Darnell's stepmother. Dr. Smith testified he maintained copies of the letters in his file and would have made them available to the court or others for review had he been asked. Dr. Smith said it was "rare" to conduct an independent investigation and the "letters were more than sufficient for the collateral investigation." He believed he did everything that was required of him under the circumstances.

Dr. Berger conceded the theft and abuse allegations were very relevant. But, he testified there was no duty on Dr. Smith to investigate independently the allegations contained in the letters and other documents. According to Dr. Berger, "Dr. Smith is a psychologist, not an investigator."

- Dr. Smith did not review police reports and CPS reports.

Dr. Owen and Dr. Johnson believed Dr. Smith had the duty to at least attempt to obtain police reports and CPS reports. They opined the failure to do so was a violation of the standard of care.

Dr. Smith testified he asked Darnell to provide him with the CPS reports or with an authorization for the release of those reports, and she promised to provide him with those documents. When she did not do so, Dr. Smith forgot to ask for them again. Dr. Smith said he had or had reviewed police records pertaining to the shoplifting. No police reports were contained in his file.

Dr. Berger testified it wasn't Dr. Smith's job to obtain such reports and he was in no position to issue subpoenas. He believed there was no violation of the standard of care.

- Dr. Smith did not interview any of the significant others' children, including any of Tim's girlfriend's four children and Darnell's fiancée's five children, with whom Kelsey lived with and around and spent considerable amounts of time.

Dr. Owen suggested the failure to make any effort to interview any of these children constituted an extreme departure from the standard of care because this was important information concerning the environments and people with whom Kelsey would be living. Dr. Johnson concluded the omission was an extreme departure from the standard of care and also had an impact on determining a visitation schedule.

Dr. Smith testified the significant others' children "were not significant children in Kelsey's life" even though they might be living under the same roof and that was the reason he did not interview them. Dr. Smith said he requested the school teachers call him, but none did.

Dr. Berger testified there was no need for Dr. Smith to interview Kelsey's "siblings" because she would be spending most of her time with her classmates at school.

- The failure to interview Dr. Singleton.

Dr. Smith was aware the parties stipulated that Dr. Singleton would provide counseling to Kelsey. Yet, before he authored his report, Dr. Smith did not contact Dr. Singleton even though he claimed he enjoyed talking with other mental health care professionals. Without the benefit of interviewing Dr. Singleton, Dr. Smith concluded Kelsey identified more with her mother than her father.

On May 31, 2001, about a month after he authored his evaluation, Dr. Smith spoke with Dr. Singleton. Dr. Singleton advised that she had seen Kelsey weekly for about two months. Kelsey seemed to have difficulty adjusting, there appeared to be a lack of



supervision at the mother's home, Kelsey made her own TV dinners in the evening, and there appeared to be more nurturing by the father, according to Dr. Singleton.<sup>11</sup>

Dr. Smith said there was no reason and he did not speak with Dr. Singleton before he authored his evaluation, but he ultimately spoke with her and included her comments and opinions in his addendum. Dr. Smith testified he did not endorse or adopt Dr. Singleton's recommendation because she "was an advocate on behalf of the child." This explanation was not contained in his addendum.

Dr. Owen and Dr. Johnson were critical of Dr. Smith for not interviewing Dr. Singleton before authoring the initial evaluation, suggesting her opinions may have had some impact on Dr. Smith's conclusions about the child's best interest.

Conclusion: A court-appointed child custody evaluator must be reasonably diligent in gathering relevant information and must remain neutral. The unreasonable failure to corroborate or refute derogatory evidence and the failure to comment upon it is not consistent with being a diligent and neutral evaluator. Particular diligence is required when considering allegations of child abuse or physical abuse.

Other than to ask Darnell if some of the allegations were true, Dr. Smith did virtually nothing to corroborate the derogatory information about Darnell's criminal history, temper and character for violence. Dr. Smith was not acting as a neutral when he accepted Darnell's simple explanations about those charges; those explanations could have minimized the truth of the accusations or even have been false. Darnell may have misled Dr. Smith concerning her temper, criminal history and tendency to violence, but he would never know that because of his lack of diligence. The court was unaware of most of this derogatory information because it was not summarized in Dr. Smith's evaluation. Dr. Smith's claim that the derogatory information was available on request was disingenuous because his report often gave no indication that such information even existed. Under the circumstances, how would the court or counsel know to ask?

Dr. Smith's failure to follow up on the information indicating Darnell was a thief and was physically abusive constituted an extreme departure from the standard of care.

Dr. Smith's failure to obtain the production of CPS reports, which were reasonably available, demonstrated a lack of diligence constituting at least simple negligence.

Dr. Smith made no real effort to interview others with whom Kelsey had been or would be living. To claim these step-siblings (the children of significant others) would not be significant persons in Kelsey's life and that was why he made no effort to interview them defied belief. This constituted at least a simple departure from the standard of care.

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<sup>11</sup> Dr. Smith telephoned the mother on June 19, 2000, and the mother denied Kelsey cooked TV dinners, stating her daughter did not know how to do so.



Taken together, Dr. Smith's numerous failures to attempt to gather reasonably available corroborating information and corroborating documents constituted an extreme departure from the standard of care expected of a reasonable and prudent court-appointed child custody evaluator.

#### *Witness Credibility*

34. Dr. Owen, Dr. Johnson, Dr. Berger and Dr. Smith were highly trained, well qualified expert witnesses within the field of psychology.

Dr. Johnson and Dr. Smith were the only experts whose occupation fundamentally involved court-appointed child custody evaluations. Dr. Smith's interest in the outcome of this disciplinary proceeding and his past disciplinary history raised questions about his actual expertise and professional judgment. Dr. Owen had limited experience as a court-appointed child custody evaluator. Dr. Berger had absolutely no experience as a court-appointed child custody evaluator, and while he may have reviewed as many as three dozen child custody evaluations and while he may have provided theoretical instruction to psychology students concerning such evaluations, Dr. Berger did not know much about the practical aspects of serving as a court-appointed child custody evaluator.

Dr. Johnson was clearly the most credible expert witness in this matter due to his experience and his lack of interest in the outcome of the proceeding. While respondent claimed Dr. Johnson was in professional competition with respondent and suggested this may have influenced his testimony, that was not the case.

Some of Dr. Johnson's opinions were reasonable, but not clear and convincing. For example, the global view that more than ten minutes should be spent observing a child and a parent interacting together may not always be true. The imposition of that global standard would impinge upon professional judgment if it were to be applied in every case without exception. As another example, the view that Dr. Smith failed to integrate his findings and authored a confusing report, while true, was not a substantial departure from the standard of care. All reports (and proposed decisions) can be better crafted in hindsight. So long as a reasonable study is performed and appropriate information gathered, writing styles and organization skills should not be the basis for license discipline except in the most egregious circumstances.

On the issue of Dr. Smith's failure to perform a reasonable inquiry into allegations of Darnell's child abuse and character, the evidence was clear and convincing. Dr. Smith's conduct fell well below the standard of care. Dr. Johnson's and Dr. Owen's opinions that Dr. Smith engaged in departures from the standard of care in this area was extremely compelling.

In determining what is in a child's best interest, a court must consider any history of abuse by one parent, and where abuse allegations have been brought to the attention of the court and the court makes a custody order, the court must state its reasons. Court rules require a child custody evaluator to observe and consider each party in comparable ways, to



review pertinent documents (including local police records) and to collect relevant corroborating information or documents. Simply reporting a letter was reviewed – as Dr. Smith did on many occasions - falls so far short of a reasonable effort to satisfy this duty as to constitute an extreme departure from the standard of care.

Similarly, the testimony of Dr. Johnson and Dr. Owen to the effect that Dr. Smith should have made some effort to interview Kelsey's step-siblings and should have made some effort to interview Dr. Singleton before authoring his evaluation was credible. The testimony underscored Dr. Smith's lack of competence and diligence.

Dr. Berger testified there was no duty on Dr. Smith to investigate the allegations contained in the collateral letters because Dr. Smith was a psychologist, not an investigator. This view was wholly inconsistent with the spirit of the governing statutes and court rules, standards requiring an impartial and thorough evaluation using multiple methods of data gathering and the collection of relevant corroborating information.

Finally, while Dr. Smith made a sympathetic appearance, he failed to provide any compelling reasons for not picking up the telephone and attempting to contact those persons who claimed to have personal knowledge about Darnell's character for violence and other unlawful activities. In some instances, he provided no explanation for the reason he failed to ask persons he did contact about Darnell's character (e.g., the paternal grandmother). In other instances, Dr. Smith testified he did not ask about relevant information because "it slipped my mind" (e.g., Brennan). Dr. Smith's failure to include the content of the letters that were critical of Darnell's character, in the absence of any effort or the inability to contact the authors, was inexplicable.

#### *Repeated Negligent Acts*

35. Respondent argued that assuming there was any negligence, the submission of the evaluation and addendum constituted a single negligent act.

The clear and convincing evidence established many acts of repeated negligence which included, but were not limited to, Dr. Smith's failure to interview Julia D. concerning Darnell's acts of violence (a message left on the answering machine was not enough), his failure to interview Kris K. concerning her observations of Darnell's acts of physical violence and Darnell's use of vulgar language in the presence of Kelsey, his failure to interview Noah D. concerning Darnell's acts of physical violence, his failure to interview Bob K. (a person with whom Kelsey lived) concerning his knowledge of Tim and Darnell's situations and character, his failure to ask Brennan about Darnell's alleged acts of child abuse and physical abuse when Dr. Smith interviewed Brennan, his failure to obtain the CPS reports which were available to him with minimum effort, his failure to interview Dr. Singleton before authoring his evaluation, and his failure to consider interviewing some of the other children with whom Kelsey might be living.



### *Incompetence*

36. The nature and extent of the repeated negligent acts and the extreme departures from the standard of care compels a conclusion that in this matter Dr. Smith lacked the competence to provide services as a court-appointed child custody evaluator in his capacity as a licensed psychologist. This conclusion was well supported by the credible expert testimony of Dr. Owen and Dr. Johnson.

However, it was not established that Dr. Smith functioned outside his particular field of competence as established by his education, training and experience. Dr. Smith held a Ph.D. in Psychology, was a licensed psychologist, received considerable training in court-appointed custody evaluations, was certified by the court as an evaluator, and had vast experience as a court-appointed child custody evaluator. The evidence did not establish that he rendered professional services outside that field.

### *Dishonesty*

37. On April 12, 2002, Dr. Smith testified his license had been suspended for gross negligence, but he didn't think there were accusations of fraud or other misconduct. In response to a specific question, Dr. Smith honestly testified the charges filed against him did not involve paid-for testimony. Dr. Smith truthfully testified he did not make any admission to charges of gross negligence, dishonesty, corrupt or fraudulent acts, repeated negligent acts, or functioning outside his field of competency. He made no such admissions, although he did stipulate the Board could establish those charges.

In his testimony at the administrative hearing, Dr. Smith said he really didn't recall what he had been charged with when he was interrogated on April 12, 2002; while that was somewhat difficult to believe because the resolution of those charges occurred less than six months before his trial testimony was given, it was not established that Dr. Smith's testimony at the trial was dishonest or untrue.

The clear and convincing evidence did not establish dishonesty, corruption or fraud in connection with Dr. Smith's testimony on April 12, 2002.

### *Violations While On Probation*

38. On December 18, 2000, Dr. Smith was appointed to conduct the custody and visitation evaluation. Shortly thereafter, Dr. Smith began collecting information and evaluating data. Dr. Smith's written evaluation was dated May 3, 2001 and his written addendum was dated June 19, 2001.

The probationary order took effect on November 14, 2001.

Dr. Smith's repeated acts of negligence and his extreme departures from the standard of care occurred shortly before probation went into effect. See, Factual Findings 4 and 11-



34. It would be unfair to find Dr. Smith violated terms and conditions of probation that did not exist when he engaged in that unprofessional conduct.

### *Measure of Discipline*

39. The Board's primary mission is to protect consumers of psychotherapeutic services from potentially harmful licensees. The Board adopted recommended guidelines to be used in disciplinary orders. A rare individual case may necessitate a departure from the guidelines and in such a rare case, the mitigating circumstances must be detailed. The guidelines state that if an administrative law judge finds that the respondent, for any reason, is not capable of safe practice, the Board expects outright revocation of the license. In less egregious cases, a stayed revocation with probation is appropriate.

For violations of Business and Professions Code 2960, unprofessional conduct involving gross negligence or repeated negligent acts, the maximum recommended sanction is revocation; however, for gross negligence or repeated negligent acts which result in minimal or no harm to a patient, the recommended sanction is five years probation with appropriate terms and conditions.

Dr. Smith attempted to justify his conduct throughout the proceeding, usually by claiming he was not required to do any more than he did. At the conclusion of his testimony, Dr. Smith testified that if he had it to do all over again, he would contact persons providing derogatory information, he would make notes to help him remember what to ask during interviews, he would work harder to obtain CPS and police reports, and he would contact school teachers directly. Dr. Smith believed he was a good probation risk because he had complied with all terms and conditions of his current probation, particularly with regard to additional education.

Dr. Smith is not capable of safe practice. Dr. Smith held a very important and responsible position as a court-appointed child custody evaluator. Dr. Smith was well aware that binding judicial decisions were going to be strongly influenced, if not actually made, on the basis of his child custody evaluations and recommendations. He knew child custody decisions have a tremendous impact on the child, the child's parents and on other persons close to the child.

Dr. Smith's child custody evaluations directly reflected on the judicial system. Judges relied on Dr. Smith's competence, professionalism, diligence and neutrality when reviewing his evaluations and making orders concerning child custody. The judicial system and the general public constituted the equivalent of Dr. Smith's "patient" in this matter, and while the making of an erroneous judicial decision was not established in this custody case, there was a substantial risk of such an error.

Dr. Smith's past history coupled with the gross negligence and repeated negligent acts established in this matter make it clear Dr. Smith cannot be trusted to render a thorough, competent, professional child custody evaluation. Dr. Smith evidently lacks the judgment



and motivation to appreciate that his position requires him to make meaningful, diligent efforts to interview persons who may have personal knowledge that one parent in a custody dispute is a liar, thief or engages in violence. Dr. Smith was too lazy or too disinterested to ask victims of alleged violence whether they had, in fact, been victimized. Dr. Smith failed to obtain reasonably available CPS reports. Although Dr. Smith ultimately spoke with Dr. Singleton and disregarded some of her conclusions, Dr. Smith failed to interview Dr. Singleton before reaching his custody recommendation.

The revocation of Dr. Smith's license will protect the public. A simple extension of probation is not warranted under the circumstances. Dr. Smith engaged in repeated negligent acts and in extreme departures from the standards of care expected of a reasonably prudent court-appointed child custody evaluator despite the prior disciplinary actions. Dr. Smith has demonstrated he was incapable of or unwilling to educate and rehabilitate himself while he was on probation.

#### *Costs of Investigation and Enforcement*

40. There is no question about the fact that the Board investigated this matter. The evidence included a 17 page investigative report. Shellee Thorson, a Medical Board Investigator, testified she provided investigative services.

There is no question that expert witness services were provided. Dr. Owen testified the Board contacted him and asked for his expert opinion. Dr. Johnson testified Deputy Attorney Samuel K. Hammond contacted him and asked of his expert opinion.

There is no question that legal services were provided through the Office of the Attorney General which included, but were not limited to, the preparation and service of an accusation, obtaining and providing documents in discovery, appearing at a prehearing conference, responding to motions to dismiss, preparing an amended accusation, and prehearing trial preparation.

The problem rests with determining the reasonable value of the investigative and legal services.

The prehearing conference order required the Office of the Attorney General to provide an interim certificate of costs and to serve it on defense counsel well before the first day of hearing. That order was reasonable because had it been followed, defense counsel would have known what kind of evidence, if any, he would have to present to contest the charges. However, the Office of the Attorney General did not provide defense counsel with an interim statement of costs as ordered, as a result of which defense counsel properly objected to the presentation of the final certification of costs.

But, the fact that the certification of costs was not received does not mean that a reasonable award of costs of investigation and enforcement cannot be determined by the administrative law judge.



The investigation into this matter likely required at least a full work week (40 hours). The expert reviewers likely spent at least two or three working days reviewing relevant materials and preparing reports (20 hours). The deputy attorney general who tried this case, which was complicated and took two full days of evidentiary hearings and one-half day of argument, likely spent at least at least two weeks (80 hours) preparing for the hearing. Notice is taken that in past similar disciplinary actions, investigative rates and the rates of the expert reviewers have been at least \$100 per hour, which is reasonable, and the legal fees charged by the Office of the Attorney General have been in the \$125 per hour range, which is reasonable.

Using these figures, a total award of costs of investigation and enforcement of \$16,000 would be reasonable if all the allegations were established (\$6,000 for investigative and expert fees [60 hours at \$100 per hour] and \$10,000 for legal fees [80 hours at \$125 per hour]).

Interestingly enough, this determination is not much higher than the stipulated cost award in the previous disciplinary action, an action which did not go to hearing (see, Factual Finding 4).

41. Rulings favorable to respondent exist on some factual issues (e.g., the time spent interviewing and observing Kelsey, the failure to administer psychological testing to the girlfriend, the administration of essentially parallel and equivalent evaluations to each parent) and on some legal issues (e.g., violations of probation and violations of Bus. & Prof. Code § 2960, subdivisions (i), (k) and (p) were not established). The bulk of the critical factual findings and the bulk of the important legal issues were favorable to complainant's position, as was the proposed order of discipline.

Under the circumstances, the award of costs should be discounted by 10%, which is determined to be the extent to which complainant did not prevail in this proceeding. The final cost award is \$14,400.

## LEGAL CONCLUSIONS

### *Purpose of the Psychology Licensing Law And the Imposition of Administrative Discipline*

1. The Psychology Licensing Law includes a legislative finding that the "practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology . . . ." *Jaffee v. Psychology Examining Committee* (1979) 92 Cal.App.3d 160, 167-168.

2. The purpose of an administrative proceeding seeking the revocation or suspension of a professional license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. See, *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.

#### *The Standard of Proof*

3. The standard of proof in an administrative disciplinary proceeding seeking the suspension or revocation of a professional license is "clear and convincing evidence." *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.

4. The key element of "clear convincing evidence" is that it must establish a high probability of the existence of the disputed facts, greater than proof by a preponderance of the evidence. Evidence of a charge is clear and convincing as long as there is a high probability that the charge is true. *People v. Mabini* (2001) 92 Cal.App.4th 654, 662.

#### *Patient Harm*

5. It is not necessary to show patient harm to impose license discipline. To forestall license discipline until the licensee harms a patient disregards the purposes of an administrative disciplinary proceeding; it is far more desirable to discipline before a licensee harms any patient than after harm has occurred. *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.

#### *Relevant Statutory Authority*

6. Business and Professions Code section 2960 provides in part:

"The board . . . may suspend or revoke the registration or license of any registrant or licensee if the . . . licensee has been guilty of unprofessional conduct. Unprofessional conduct shall include, but not be limited to:

...

(i) Violating any rule of professional conduct promulgated by the board and set forth in regulation . . .

(j) Being grossly negligent in the practice of his or her profession.

...

(n) The commission of any dishonest, corrupt or fraudulent act.

...



(p) Functioning outside his or her.

...

(r) Repeated acts of negligence.”

### *The Standard of Care*

7. Licensed professionals must exercise that degree of skill, knowledge and care ordinarily possessed and exercised by members of the same profession under similar circumstances. The standard of care is a matter peculiarly within the knowledge of experts; it presents the basic issue and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman. See, *Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1424.

8. Expert opinion is required to prove or disprove that a licensed professional performed in accordance with the prevailing standard of care. See, *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.

### *Negligence/Gross Negligence/Incompetence*

9. “Negligence” is conduct falling below the standard of care. The standard of care varies in different situations, but the standard of conduct remains constant, i.e., due care commensurate with the risk posed taking into consideration all relevant circumstances. *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.

10. “Gross negligence” is “the want of even scant care or an extreme departure from the ordinary standard of conduct.” *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.App.4th 1175, 1185-1186.

11. The phrase “repeated negligent acts” means two or more acts. *Zabetian v. Medical Board* (2000) 80 Cal.App.4th 462, 468.

12. While Business and Professions Code section 2960, subsection (p) has not been judicially interpreted, a regulation containing similar language was considered in *Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, where the appellate court affirmed the violation of the regulation by a psychologist (who was not permitted to prescribe medications under his license) who illegally prescribed and furnished dangerous drugs to a patient.

### *Respondent’s Affirmative Defenses*

13. The Claim of Quasi-judicial Immunity: Respondent unsuccessfully argued in a prehearing motion that respondent possessed quasi-judicial immunity which shielded him

from professional discipline. In respondent's hearing brief and in an oral motion brought at the outset of this hearing, respondent raised this affirmative defense again.

Family Code section 3110.5, subdivision (e) is dispositive - a child custody evaluator who is licensed by the Board of Psychology is subject to disciplinary action for unprofessional conduct as defined in the licensing laws applicable to that licensee.

14. The Claim the Evaluation Was Illegally Obtained: In his hearing brief and in an oral motion brought at the outset of this hearing, respondent argued respondent's written child custody evaluation and the addendum should be suppressed because they were illegally obtained and all evidence based upon a review of those documents was fruit of the poisonous tree. Respondent noted the evaluation and addendum were confidential under Orange County Superior Court Rule 7.03D and the unauthorized removal of the report was a felony. Respondent argued complainant never produced a copy of a court order authorizing any person to copy or remove Dr. Smith's evaluation and addendum.

Exclusionary rules are based upon the principle that the state should not profit by using evidence obtained by unconstitutional methods and upon the premise that denying any profit to law enforcement officers who may be tempted to use illegal methods, the rules will have a deterrent effect. *Emslie v. State Bar of California* (1974) 11 Cal.3d 210, 226-227.

In *Emslie*, The California Supreme Court concluded:

"We find that a balancing test must be applied in such [disciplinary] proceedings and consideration must be given to the social consequences of applying the exclusionary rules and to the effect thereof on the integrity of the judicial process. While we hold that the exclusionary rules are not part of administrative due process in . . . disciplinary proceedings we do not intimate that circumstances could not be presented under which the constitutional demands of due process could not countenance use of evidence obtained by unlawful means in a proceeding conducted by such governmental agency . . . The application of such rules must be worked out on a case-by-case basis in this and other license revocation proceedings." *Ibid.*, pp. 229-230.

Appellate courts following *Emslie* have uniformly declined to apply the exclusionary rule in proceedings where the rule would not deter the unlawful search at issue. *Finkelstein v. State Personnel Board* (1990) 218 Cal.App.3d 264, 270.

*Dyson v. State Personnel Board* (1989) 213 Cal.App.3d 711 applied the exclusionary rule in a State Personnel Board disciplinary proceeding. In that matter, incriminating evidence was unlawfully seized from Dyson's home by the agency. The search was initiated, directed and executed by an agency employee acting as a peace officer. The evidence that was seized was turned over to police authorities for use in a criminal proceeding. The criminal prosecution was dismissed because the agency's search violated Dyson's constitutional rights to privacy. The evidence was excluded in the administrative proceeding



because “the deterrent effect [of the exclusionary rule] would work directly on the agency conducting the search for evidence of crime.” (*Ibid.*, at p. 719.)

*Dyson* does not apply in this matter because it is so factually different.

It was not established Dr. Smith’s evaluation and addendum were unlawfully or unconstitutionally obtained by the Board, its investigators or anyone acting under their direction. If the evaluation and addendum were unlawfully obtained by a third person, the application of the exclusionary rule would have no deterrent effect on the Board and its application would be directly contrary to the protection of the public from unprofessional practitioners.

This conclusion is based on Factual Findings 5-15 and this Legal Conclusion.

15. The Claim There Was a Single Act of Negligence: Citing *Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, respondent correctly argued a single instance of negligent conduct would not provide grounds for license discipline under the disciplinary statute. During the course of this hearing, respondent seemed to argue that since his evaluation and addendum constituted a single document that was filed with the court, his negligence, if any, did not extend beyond that “single” document.

In fact Dr. Smith engaged in multiple, repeated acts of simple and gross negligence. See, Factual Findings 23-35. Respondent’s effort to consolidate those independent repeated acts of negligence into a single act of negligence by claiming the submission of the evaluation and addendum was but one act of negligence was insincere and inconsistent with the purposes of the licensing act.

16. The Alleged Violation of Separation of Powers: Respondent did not mention this argument in his hearing brief. This defense was first presented in an oral motion brought at the outset of the hearing. Respondent appeared to argue that since the judicial system was responsible for certifying court-appointed child custody evaluators, the judicial system was the only branch of government with the authority to impose sanctions against those persons for unprofessional conduct.

Unlike the regulation of the practice of law which has been exclusively left to the judiciary (see the discussion in *Hustedt v. Workers’ Compensation Appeals Board* (1981) 30 Cal.3d 329, 336-338), the admission and discipline of a licensed psychologist is a legislative and executive question. Disciplinary actions are subject to review by the superior court.

As pointed out by the California Supreme Court in *Hustedt* at page 338, this pragmatic approach is grounded in the recognition that the separation of powers doctrine does not command a hermetic sealing off of the three branches of government from one another. Although the doctrine of separation of powers defines a system of government in which the powers of the three branches are to be kept largely separate, it also comprehends the existence of common boundaries between the legislative, judicial, and executive zones of



power thus created. Its mandate is to protect any one branch against the overreaching of any other branch.

The Legislature established grounds for licensing and disciplining psychologists. The Board had the obligation to bring this action under the regulatory law. The Board's decision may be reviewed by the judicial system. There has been no violation of the separation of powers doctrine.

17. The Protections Afforded by the Adversary System: Respondent essentially argued that since his report was provided to the court and was disclosed to each party, since each party had an attorney, since each party had the right to hire an independent child custody evaluator under Evidence Code section 733, since each party had the right to question respondent under oath about the contents of his evaluation (as was the case), and since no actual harm was established, the adversary system provided adequate protection against any minor omissions that may have occurred.

This argument missed the mark.

A court-appointed child custody evaluator has a duty to act in a professional fashion. Courts rely on these professionals to provide competent, thorough, professional reports in the first instance. A court-appointed child custody evaluator cannot avoid license discipline by claiming that errors, omissions or unprofessional conduct don't matter because there is an opportunity that misconduct might be discovered and rectified in an adversarial setting. Patient harm need not be shown to impose license discipline.

18. The Implied Estoppel Claim: There was a suggestion in the course of the hearing that the settlement of the prior disciplinary action (see, Factual Finding 4) may have included a resolution of the child custody evaluation giving rise to this disciplinary action on the basis that the settlement was designed to resolve all disputes between Dr. Smith and the Board through the effective date of the settlement agreement. A review of the settlement agreement did not establish that to be the case. The child custody evaluation giving rise to this disciplinary proceeding was not referred to in the prior settlement agreement.

#### *Cause to Impose Discipline*

19. Cause does not exist to impose discipline against Dr. Smith's license for a violation of probation. It was not established that Dr. Smith's unprofessional conduct occurred during the period he was on probation – Dr. Smith's unprofessional conduct predated the imposition of probation. It was not established that Dr. Smith practiced outside his field of competence and expertise, although it was established he was incompetent and unprofessional in the child custody evaluation giving rise to the accusation. It was not established that Dr. Smith misrepresented his professional qualifications or affiliations.

This conclusion is based on Factual Findings 4 and 11-37.



20. Cause does not exist to impose discipline against Dr. Smith's license for violating Business and Professions Code section 2960, subdivision (n). It was not established by the clear and convincing evidence that Dr. Smith's statements in the trial of the underlying child custody matter were dishonest, corrupt or fraudulent.

This conclusion is based on Factual Findings 13 and 36 and on Legal Conclusions 1-6.

21. Cause does not exist to impose discipline against Dr. Smith's license for violating Business and Professions Code section 2960, subdivision (p). It was not established by the clear and convincing evidence that Dr. Smith functioned outside his particular field of competence as established by his education, training and experience. Dr. Smith provided services as a court-appointed child custody evaluator, a function in which he had considerable education, training and experience.

This conclusion is based on Factual Findings 2-10 and 35 and on Legal Conclusions 1-6.

22. Cause was not established to impose discipline against Dr. Smith's license for violating Business and Professions Code section 2960, subdivision (i). It was not established by the clear and convincing evidence that Dr. Smith violated any rule of professional conduct set forth in California Code Regulations, title 16, section 1396 et seq. which are known as the rules of professional conduct and involve such matters as not practicing outside an area of competency, boundary violations, misrepresentations, the reproduction of psychological tests, the failure to comply with child abuse reporting requirements, etc.

This conclusion is based on Legal Conclusions 1-6 and the failure to produce such evidence.

23. Cause exists to revoke Dr. Smith's license for violating Business and Professions Code section 2960, subdivision (j). The clear and convincing evidence established that Dr. Smith engaged gross negligence by failing to conduct a complete and thorough court-ordered child custody evaluation.

This conclusion is based on Factual Findings 2-34 and 38 and on Legal Conclusions 1-18.

24. Cause exists to revoke Dr. Smith's license for violating Business and Professions Code section 2960, subdivision (r). The clear and convincing evidence established that Dr. Smith engaged in independent, repeated negligent acts.

This conclusion is based on Factual Findings 2-35 and on Legal Conclusions 1-18.



*Costs of Investigation and Enforcement*

25. Business and Professions Code section 125.3 provides in part:

“(a) . . . in any order issued in resolution of a disciplinary proceeding before any board within the department . . . the board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case.”

...

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a) . . . .”

26. Cause exists under Business and Professions Code section 125.3 to issue an order directing Dr. Smith to pay the reasonable costs of investigation and enforcement of \$14,400.


This conclusion is based on Factual Findings 39 and 40 and on Legal Conclusions 23-25 and the findings set forth therein.

ORDERS

Psychologist's License No. PSY 11278 issued to respondent Donald K. Smith, Ph.D. by the Board of Psychology is revoked.

Donald K. Smith is ordered to pay reasonable costs of investigation and enforcement in the amount of \$14,400 to the Board of Psychology.

DATED: 10/26/05

  
JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings

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7 Attorneys for Complainant

8  
9 **BEFORE THE**  
**BOARD OF PSYCHOLOGY**  
10 **DEPARTMENT OF CONSUMER AFFAIRS**  
**STATE OF CALIFORNIA**

11 In the Matter of the Amended Accusation and  
Petition to Revoke Probation Against:

12 **DONALD K. SMITH, Ph.D.**  
13 333 City Boulevard West, #1235  
Orange, CA 92668

14 Psychologist's License No. PSY 11278

15 Respondent.  
16

Case No. W277

OAH No. L-2004110129

**AMENDED ACCUSATION AND  
PETITION TO REVOKE  
PROBATION**

17 Complainant alleges:

18 **PARTIES**

- 19 1. Jeff Thomas (Complainant) brings this Amended Accusation and Petition  
20 to Revoke Probation solely in his official capacity as the Interim Executive Officer of the Board  
21 of Psychology, Department of Consumer Affairs, State of California (Board).
- 22 2. On or about August 1, 1989, the Board issued Psychologist's License  
23 No. 11278 to DONALD K. SMITH, Ph.D. (Respondent). The psychologist's license was in full  
24 force and effect at all times relevant to the charges brought herein and will expire on  
25 December 31, 2004, unless renewed. In a Decision and Order of the Board in Case No. W-162  
26 effective November 14, 2001, Respondent's psychologist's license was revoked, but the  
27 revocation was stayed and the license was placed on five (5) years probation under specified  
28 terms and conditions.





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4. Section 2960 of the Code states:

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- 11 . . . .

5. Section 2964.6 of the Code states:

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1                   6.       Section 125.3 of the Code provides, in pertinent part, that the Board may  
2 request the administrative law judge to direct a licensee found to have committed a  
3 violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the  
4 investigation and enforcement of the case.

5                   7.       This Amended Accusation and Petition to Revoke Probation are made in  
6 reference to the following sections of California Code of Regulations, Title 16, Div. 13.1  
7 (C.C.R.):

8                             (a) Section 1396 provides that a psychologist shall not function outside  
9 his or her field or fields or competence as established by his or her education,  
10 training and experience.

11                            (b) Section 1396.2 provides that a psychologist shall not misrepresent nor  
12 permit that misrepresentation of his or her professional qualifications, affiliations,  
13 or purposes, or those institutions, organizations, products and/or services with  
14 which he or she is associated.

15                   8.       This Amended Accusation and Petition to Revoke Probation are made in  
16 reference to the Board's Decision and Order in Case No. W-162, effective November 14, 2001,  
17 by which Respondent's psychologist's licence was placed on five (5) years probation with certain  
18 terms and conditions. The term and condition pertinent to the petition to revoke probation is as  
19 follows:

20                           TERM AND CONDITION "E" provided: "OBEY ALL LAWS Respondent  
21 shall obey all federal, state and local laws, all rules governing the practice of  
22 medicine (sic) in California, and remain in compliance with all court ordered criminal  
23 probation, payment, and other orders."

24                           **CAUSES FOR DISCIPLINE AND REVOCATION OF PROBATION**

25                   9.       Respondent Donald K. Smith, Ph.D., is subject to disciplinary action and  
26 his probation is subject to revocation for unprofessional conduct in violation of Code sections  
27 2960(j), 2960(p), 2960(r) as follows:

28       ///



1                   Patient K.K.

2                   A.     On or about December 18, 2000, in a matter before the Superior Court of  
3     the State of California for the County of Orange, Case No.00D008429, as part of a marriage  
4     dissolution order, the court ordered a joint custody arrangement whereby legal custody of patient  
5     K.K., then 7 years old, was awarded to the mother and the father (Mrs. D.K. and Mr. T.K.), but  
6     physical custody of the patient was awarded to Mrs. D.K. In addition, the court ordered a child  
7     custody evaluation pursuant to the provisions of Evidence Code section 730 (E.C. section 730).<sup>1</sup>  
8     Respondent was appointed to be the E.C. section 730 evaluator.

9                   B.     Between about January 4, 2001 and March 23, 2001, respondent  
10    conducted an Evidence Code section 730 evaluation study which included separate interviews  
11    with Mr. T.K. and his girlfriend, 2 interviews with patient K.K. (the first lasted 30 minutes and  
12    the second, conducted two months later, lasted 25 minutes), and a joint interview with Mrs. D.K.  
13    and her boyfriend. Respondent also conducted psychological testing on Mr. T. K., Mrs D. K. and  
14    Mrs. D.K.'s boyfriend but no psychological testing was performed on Mr. T.K.'s girlfriend.  
15    Respondent performed a "single projective" test on patient K.K., and spent 10 minutes observing  
16    the patient with his father and his girlfriend, and 10 minutes observing the patient with her  
17    mother and her boyfriend.

18                  C.     During the period of the study respondent received the joint-declaration of  
19    the patient's paternal grandparents (T.K.'s parents). The declaration, dated November 11, 2000,  
20    stated among other things, that the patient's paternal grandparents have been involved in raising  
21    the patient since her birth and had lived continuously with the patient during the three months  
22    immediately preceding the date of the declaration. Respondent failed to interview the

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25                  1. Evidence Code section 730 provides, in pertinent part, that "when it appears to the  
26    court, at any time before or during the trial of an action, that expert evidence is or may be  
27    required by the court or by any party to the action, the court on its own motion, or on motion by  
28    any party may appoint one or more experts to investigate, to render a report as may be ordered  
   by the court, and to testify as an expert at the trial of the action relative to the fact or matter as  
   to which the expert evidence is or may be required."

1 paternal grandfather and failed to adequately evaluate the paternal grandparents' involvement in  
2 the patient's life.

3 D. During the period of the study, respondent received a letter from N.C.D.  
4 who stated he lived with Mr. T.K. and Mrs. D.K. while attending high school. The letter stated  
5 Mrs. D.K. was a thief and a liar who was physically abusive of the children in the home.  
6 Respondent failed to interview N.C.D. to inquire into his allegations.<sup>2</sup> During the period of the  
7 study, respondent received information that Mrs. D.K. was reported to Children Protection  
8 Services (CPS) based on allegations she physically abused her older son, that Mrs. D.K. had an  
9 explosive temper, that she emotionally abused her children, that she physically and verbally  
10 abuses adults in the presence of patient K.K., and that she was once arrested by the police for  
11 shoplifting. Respondent failed to properly follow-up on any of this information, and failed to  
12 adequately interview Mrs. D.K.'s older son about the physical and verbal abuse.

13 E. During the period of the study, respondent learned that Mrs. D.K.'s  
14 boyfriend had five children and that Mr. T.K.'s girlfriend had four children. Respondent failed to  
15 observe patient K.K.'s interactions with the significant children in her life and failed to evaluate  
16 patient K.K.'s relationship with these children. Respondent also failed to adequately interview  
17 patient K.K.'s therapist.

18 F. Respondent issued his E.C. 730 Evaluation report on May 3, 2001, and  
19 issued an addendum to his report on June 19, 2001. In the report, respondent failed to integrate  
20 findings from the results of the Minnesota Multi phasic Personality Inventory-2 (MMPI-2) and  
21 the Million Clinical Multiracial Inventory-III (MCI-III) tests he administered on the patient's  
22 parents. He also failed to comment on factor scales included in the Child Abuse Potential  
23 Inventory - Form VI (CAPOS - Form VI) test he performed on the patient's parents. In his  
24

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25 2. N.C.D. was interviewed by the Board's investigator on January 20, 2004. He stated  
26 Mrs. D.K. instructed him to steal items from various stores, that he witnessed Mrs. D.K. place  
27 items in patient K.K.'s stroller while shopping and walked out without paying for the items,  
28 that Mrs. D.K. stole a device for removing clothing sensor at Nordstrom's Department Store so  
she could remove the clothing sensors and take clothing out of the store without paying for  
them.



1 report, respondent failed to comment on any information he obtained from his interview of Mrs.  
2 D.K.'s older son about Mrs. D.K.'s physical and verbal abuse, and failed to integrate the  
3 impressions of patient K.K.'s therapist.

4 10. Respondent Donald K. Smith, Ph.D. is subject to disciplinary action and  
5 his probation is subject to revocation for unprofessional conduct in violation of Code sections  
6 2960(j), 2960(p) and 2960(r) as follows:

7 A. Complainant here realleges the allegations in paragraph 9, above.

8 B. Respondent failed to conduct an adequate, complete and thorough  
9 Evidence Code section 730 study in that respondent:

10 (i) Spent 10 minutes observing the patient with her father and his  
11 girlfriend, and 10 minutes observing the patient with her mother and her  
12 boyfriend.

13 (ii) Respondent failed to perform psychological testing on Mr. T.K.'s  
14 girlfriend.

15 (iii) Respondent failed to interview the paternal grandfather and failed to  
16 adequately evaluate the paternal grandparents' involvement in the life of the  
17 patient.

18 (iv) Respondent failed to interview N.C.D.

19 (v) Respondent failed to follow-up with CPS on the allegations of D.K.'s  
20 physical and verbal abuse of her children.

21 (vi) Respondent failed to follow-up on the information about D.K.'s arrest  
22 for and history of shoplifting.

23 (vii) Respondent failed to observe patient K.K.'s interactions with the  
24 significant children in her life and failed to evaluate patient K.K.'s relationship  
25 with these children.

26 (viii) Respondent failed to adequately interview patient K.K.

27 (ix) Respondent failed to use a parallel and equivalent evaluation method  
28 to evaluate the patient's parents.

1 C. Respondent failed to generate a complete and an adequate Evidence Code  
2 section 730 evaluation report in that:

3 (i) Respondent relied on computer-generated interpretative summaries for  
4 the MMPI-2 and MCI-III tests and failed to effectively integrate the results.

5 (ii) Respondent failed to include an interpretation of the CAPOS-Form VI  
6 test in his report and failed to comment on the test's factor scales such as distress,  
7 rigidity, unhappiness, problems with child and self, problems with family, and  
8 problems with others.

9 (iii) Respondent concluded the patient was "somewhat closer to her  
10 mother than her father" based solely on his "single projective" test and without  
11 stating the objective basis for his conclusion.

12 11. Respondent Donald K. Smith, Ph.D. is further subject to disciplinary  
13 action and his probation is subject to revocation for unprofessional conduct in violation of Code  
14 section 2960(n) as follows:

15 On or about April 12, 2002, at an Evidence Code section 730 trial, the Superior  
16 Court held an "in camera" hearing to determine the respondent's license status. At the "in  
17 camera" hearing, respondent acknowledged to the Court that the Board had imposed the  
18 disciplinary action of probation on his psychologist's licence in 2001, but that the charges in the  
19 "Accusation" did not involve "fraud." This is a false and misleading statement in that Amended  
20 Accusation No. W-162, the charging document, contains allegations and charges of acts of fraud  
21 and dishonesty.

22 12. Respondent Donald K. Smith, Ph.D. is further subject to disciplinary  
23 action and his probation is subject to revocation for unprofessional conduct in violation of Code  
24 section 2960(I) in conjunction with CCR sections 1396 and 1396.2, and 2960(k) in conjunction  
25 with CCR sections 1396 and 1396.2 in that respondent violated psychology license law as more  
26 particularly alleged in paragraph 9 through 11, above.

27 13. The probation granted Respondent in Case No. W-162 is subject to  
28 revocation in that Respondent violated provisions of the Psychology Licencing Law and violated



1 laws and regulations pertaining the practice of psychology, as more particularly alleged in  
2 paragraph 9 through 12, above.

3 PRAYER

4 WHEREFORE, Complainant requests that a hearing be held on the matters herein  
5 alleged, and that following the hearing, the Board issue a decision:

6 1. Revoking or suspending Psychologist's Licence No. PSY 11278, issued to  
7 DONALD K. SMITH, Ph.D.

8 2. Ordering DONALD K. SMITH to pay the Board the reasonable costs of  
9 the investigation and enforcement of this case, and, if placed on probation, the costs of probation  
10 monitoring;

11 3. Taking such other and further action as deemed necessary and proper.

12 DATED: 9/15/05  
13

14 Samuel K. Hammond, For  
15 JEFF THOMAS  
16 Acting Executive Officer  
17 Board of Psychology  
18 State of California  
19 Complainant

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